

Private Enterprise in China: The Developing Law of Collective Enterprises

The recent economic reforms in China have been accompanied by a marked increase in the level of private enterprise activity in China, especially those enterprises known as collective enterprises [jiti qiye].¹ A tremendous number of new collective enterprises have been established² whose structure and operation in many respects resembles western-style

*Mr. Chao is an attorney with O'Melveny & Myers, in Los Angeles, California. Mr. Chao is spending approximately one year teaching law and consulting in Shanghai and Beijing, China. The authors would like to thank William Alford, Robert E. Lutz and Paul Theil for their valuable comments and assistance in the preparation of this article.

†Mr. Yang is a Masters Degree candidate at the Law Faculty of Fudan University, Shanghai, People's Republic of China.

1. There are three types of enterprises in China, state-owned, collective and individual. State-owned enterprises, as their name suggests, are owned by the state as a whole. Collective enterprises are owned by a group of individuals, who sometimes (but not always) work in a common work unit or live in the same neighborhood. Individual enterprises are owned by an individual or a household.

In 1984 the total value of products of all Chinese rural collective businesses amounted to 55 billion RMB compared to a total national industrial output of 703 billion RMB. Recent situations of Reforms of China's Economic System, *Jingji Gaige Wenzhai* [Digest of Economic Reforms], No. 3, 1985, at 5 (hereinafter referred to as "Recent Reforms"); Zhonghua Renmin Gongheguo Guowuyuan Gongbao [Chinese State Council Communiqué], No. 11, 1985, at 309.

The World Bank estimated in 1983 that large urban collectives produced nearly 10 percent of China's net industrial output and accounted for one-fourth of industrial employment. 1 THE WORLD BANK, CHINA: SOCIALIST ECONOMIC DEVELOPMENT 156 (1983).

The current official exchange rate is approximately 2.83 RMB to one U.S. dollar.

2. For example, in Shanghai in the latter half of 1984 there were 1,527 new collective enterprises formed, *An Investigation on 100 Newly Opened Companies in Shanghai*, MINZHU YU FAZHI [Democracy and Legal System], No. 3, 1985, at 13 [hereinafter cited as Investigation of 100 Companies], and this figure increased to more than 3,700 (including those mentioned above) by the end of May of 1985, *The Urgent Need to Investigate and Regulate Newly Opened Enterprises*, Jiefang Ribao [Liberation Daily], June 24, 1985, at 1, col. 1.

stock companies. Several of these companies have even gone so far as to make public offerings of stock. In recent months there have also been a multitude of new Chinese laws, both national and local, regulating these new enterprises. Until now, however, there have apparently been no published accounts in the United States of these laws. Thus, the aim of this article is to examine the Chinese legal framework regarding the formation, capitalization, management and taxation of collective enterprises.³

These laws and accompanying practices are important not only in order to understand collective enterprises, but also because they may well serve as precedent for the future path of state-owned enterprises in China. The decentralization of state-owned enterprise makes it likely that there will be fewer and fewer differences between them and collective enterprises. Practitioners may further find that a knowledge of Chinese domestic laws in this area will be beneficial in understanding by analogy Chinese laws with respect to foreign investment. Understanding collective enterprises will also be important since these enterprises may be potential partners in future Chinese-foreign joint ventures.

I. Brief History of Collective Enterprises in China

A. DEFINING COLLECTIVE ENTERPRISES

It is difficult to define "collective enterprises" without placing them in their historical context. Indeed, the Chinese government often treats enterprises with identical legal structures differently simply because they were

3. A few words about methodology are appropriate, since there are many inherent difficulties in doing legal research in China. First, because of the relatively recent development of a legal system in China, many rules and policies are tentative and in a state of flux. For this reason many documents are classified as "internal [neibu]" and are not publicly available, although the content of such documents is discernible from the practices and statements of governmental agencies. In addition, many rules and policies are unwritten and hence cannot be cited. However, an attempt has been made to cite as many statutory sources as possible. The authors have also relied to a considerable extent on published articles in the Chinese press which often reflect official government policy. A complete set of the Chinese laws and published articles cited herein are on file at the offices of O'Melveny & Myers in Los Angeles, California. The authors also conducted interviews with officials from twelve new collective enterprises of various sizes and from diverse industry segments, and with many Chinese lawyers and governmental officials. Most of the research was done in the city of Shanghai, which in many ways is the most sophisticated commercial city in China. Thus, references will be made to the local regulations of the city of Shanghai but not to those of any other locality. Because of the vastness of China, one cannot be certain that what is described is true throughout China, but the authors believe the situation in Shanghai to be fairly representative.

It should also be remarked that the rules and practices described in this article are still in the process of development and hence are not always followed in a consistent way. This of course points to the need for codification, which is well underway, and experience, which will only come with time.

formed at different points in history. Thus it is necessary to digress here somewhat to describe briefly the history of collective enterprises in China.⁴

The period following the establishment of the People's Republic of China from 1949 to 1956 saw a significant decline in the role of private enterprise in the national economy. The "nationalist capitalist enterprises" went through a process of "socialist transformation" whereby management power, and eventually formal ownership, was gradually transferred over to the state. At the end of this period, however, rural and street collective enterprises began to be formed. In the countryside, agricultural units formed collective enterprises to engage in processing of agricultural products and light manufacturing. In the cities, the organization of individual tradesmen and shopkeepers into cooperative groups and the participation of women in the workplace brought about a similar growth in the number of urban collective enterprises. In theory both rural and urban collective enterprises were collectively-owned, not stated-owned, and thus they were "nongovernmental." However, as a practical matter these early collective enterprises were under the direct administrative control of local government and party committees. In addition, collective ownership did not entitle the collective members to dividends or management control, and ownership interests were not transferable and could not be retained if the member left the collective. But these early collective enterprises did differ from state-owned enterprises in two important respects: their production plans were not incorporated directly as part of the State Economic Plan, and they were not required to remit their profits to the state.

The recent era of economic reforms began in 1978 with the gradual loosening of state controls over economic activity, primarily in rural areas. Since then agricultural activity and rural collective enterprises have shown a remarkable resurgence of vitality. In the cities, state controls over the private sector were also reduced, and this process was accelerated by the enactment on October 20, 1984, by the Central Committee of the Party, of a Decision on Reform of the Economic Structure [hereinafter referred to as the Decision on Economic Reform or the Decision],⁵ a document of historic importance which sets forth a blueprint for the economic modernization of urban China. The primary aim of the Decision is to stimulate the Chinese economy through a combination of decentralization measures⁶ and an in-

4. For a general discussion of this subject, see D. SOLINGER, *CHINESE BUSINESS UNDER SOCIALISM* (1984).

5. Central Committee of the Communist Party of China, Decision on reform of the Economic Structure (adopted by the Twelfth Central Committee of the Communist Party of China, Third Plenary Session, Oct. 20, 1984).

6. See the Decision, art. 2, entitled "Reform is aimed at establishing a dynamic socialist economic structure." In art. 3 of the Decision, entitled "Invigorating enterprises is the key to

creasing reliance on market mechanisms.⁷ Government is to generally withdraw from managing companies and retain only a regulatory role.⁸ The importance of the State Economic Plan will be reduced⁹ and the commodity price structure will be reformed so as to allow markets to operate effectively.¹⁰ Companies will have increasing control over what and how much they produce and will become economically self-accountable units.¹¹

While the Decision on Economic Reform places primary emphasis on restructuring state-owned enterprises and relying on them as the principal motor of economic development, it also encourages the development of other diverse forms of business activity. Article 8 of the Decision states that while state-owned enterprises "constitute the leading force in China's socialist economy," the "collective economy is an important component of the socialist economy," and the individual economy is "a necessary and valuable adjunct to the socialist economy. . . ." Both collective and individual economy should be promoted vigorously, and China "should try to remove obstacles in the way of the collective economy and individual economy in cities and rural towns and create conditions for their development and give them the protection of the law." Article 8 also expresses the policy of extensively encouraging "diverse and flexible forms of cooperative

restructuring the national economy," it is stated that in a socialist economy "ownership can be duly separated from the power of operation" and that "on the premise of following the state plans and subjecting itself to state control, the enterprise has the power to adopt flexible and diversified forms of operation; plan its production, supply and marketing; keep and budget funds it is entitled to retain; appoint, remove, employ or elect its own personnel according to the relevant regulations; decide on how to recruit and use its work force, and on wages and rewards; set the prices of its products within the limits prescribed by the state; and so on."

7. The Decision, art. 4, entitled "Establish a planning system under which the law of value is consciously applied for developing a socialist commodity economy," provides that "[t]he full development of a commodity economy is an indispensable stage in the economic growth of society and a prerequisite for our economic modernization. It is the only way to invigorate our economy and prompt enterprises to raise their efficiency, carry out flexible operations and promptly adapt themselves to complex and changing social demands."

8. The Decision, art. 6, entitled "Separate government from enterprise functions so that government organs can properly perform their function of managing the economy," states that one of the principles in the Chinese economic reforms is "separating the functions of government and enterprises, streamlining administration and instituting decentralization" with regard to the government function of regulating the economy, and that "from now on government departments at various levels will, in principle, not manage or operate enterprises directly."

9. The Decision, art. 4, indicates that "it is necessary, step by step and to an appropriate extent, to reduce mandatory planning. . . ."

10. The Decision, art. 5, entitled "Establish a rational price system and pay full attention to economic levers" provides that pricing is important in regulating production and operation, and indicates the necessity "to establish a rational system of pricing." It concludes that "reform of the price system is the key to reform of the entire economic structure."

11. The Decision, art. 2, provides that

[t]he enterprise should be truly made a relatively independent economic entity and should become a producer and operator of socialist commodity production that is independent and responsible for its own profits and losses and capable of transforming and developing itself and that acts as a legal person with certain rights and duties.

management and economic association among the state, collective and individual sectors of the economy on the basis of voluntary participation and mutual benefit." It is in this context that the latest waves of new collective enterprises have been formed.

B. COLLECTIVE ENTERPRISES SINCE 1978

The new collective enterprises formed since 1978 differ in very fundamental ways from the old collective enterprises. Their ownership is truly in the hands of a defined group of private individuals, parent companies or other institutions. This ownership interest entitles the holders, at least in theory, to participate in management. The holders also have a real interest in the profits and assets of the enterprise. Furthermore, the owners of the new collective enterprises, unlike the members of the old collective enterprises, are not necessarily related through residential proximity or common work units. They often have nothing more in common than a desire to invest together. Thus, the most salient fact about the new enterprises is that while in form and theory they resemble the old collectives, in practice they have leapt from their quasi-governmental origins to become enterprises in many ways very similar to western stock companies. We will see later however that there are still important differences, especially with regard to the characteristics of the stock being issued, so the comparison does have its limits.

There are several recurring patterns that explain how so many new enterprises have been formed recently. First, many state-owned enterprises have been forming subsidiaries, often in conjunction with individual or collective shareholders. State-owned enterprises have been gaining increasing independence in recent years, and this has been accelerated by the promulgation of the Decision on Economic Reform. State-owned enterprises over the past few years have been gradually shifted to a system where they pay taxes to the state but are allowed to retain any remaining profits, whereas previously they were required to remit their profits to the state.¹² Part of these retained profits are placed in a "fund for enterprise development [fazhan jijin]" and can be used at the discretion of the enterprise. These funds are invested in new collective enterprises. Through such investments the state-owned enterprises hope to participate in the fast growing market sector of the Chinese economy and engage in lines of business which are not within the scope of their own corporate purposes. The state-owned enterprises often extend the benefit of their connections and influence to help bring business to the new enterprises, and may even do business with them directly.

12. See the Report on the Final Accounting of the 1984 State Budget and on the Proposed 1985 State Budget, ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO [Chinese State Council Communique], No. 11, 1985, at 323 (1985).

Another common scenario is for an existing rural or urban collective to organize a new collective enterprise. Since the advent of the economic reforms and their newly found independence, many of the old collective enterprises have experienced explosive growth and have built up substantial retained profits which they are anxious to reinvest. Rural collectives in particular are eager to invest because they see their investment as a potential source of technology transfer from the city to the countryside and a source of jobs for their surplus farm laborers. Similarly, urban collectives draw upon their "common accumulation funds [gongjijin]," which are also derived from retained profits, to invest. Other institutions of all types throughout China have also been investing in new enterprises, including hospitals, universities, theaters and even the armed forces. And of course there have been the much publicized public offerings of stock to members of the public at large which will be discussed in some detail later.

Private individuals are often the promoters of the new collective enterprises. They may be retired individuals, prominent persons who have other employment as well, or managers and engineers who have resigned from their former employment to start business on their own. However, since individuals in China usually do not have sufficient personal funds to start a substantial business, the promoters must often solicit institutional investors, such as state-owned enterprises or old collectives, to provide seed capital.

Finally, the recent denationalization program of many small businesses has given rise to new collective enterprises. Many state-owned shops and other small businesses are being sold to their employees who form a new collective enterprise to take over the business.¹³

In 1983 and 1984 many new collective enterprises were also formed with the sponsorship of government agencies, local party organizations, or persons in positions of power therein. In late 1984 the government found this practice was creating conflicts of interest and gave such enterprises an unfair competitive advantage, and therefore decided to prohibit it. Investments already made were required to be converted into short-term loans, and government or party officials who had become enterprise officers were required to resign from one of their positions.¹⁴

13. The Report on Some Problems in Current Reforms of the Urban Commercial System, ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO [Chinese State Council Communiqué], No. 17, at 577-579 (1984), states that the three ways for small sized state-owned shops to undergo "reform" are (1) to be operated by a collective enterprise while still being owned by the state; (2) to be sold to a new collective enterprise; or (3) to be leased to an individual.

14. The Central Discipline Committee of the Chinese Communist Party issued a notice on Jan. 5, 1985, demanding strict enforcement from Party Discipline Committees at various levels of a joint decision by the Party Central Committee and the State Council on the prohibition of enterprises started and operated by party and/or government organs, or by their officials. See *Vigorously Clearing-up and Investigating Commercial Enterprises Sponsored by Party and Government Organs and Cadres*, Xinmin Wanbao [New People's Evening Newspaper], Jan.

II. Formation of Collective Enterprises

A. REGISTRATION LAWS AND INSTITUTIONS

Before opening for business, a new collective enterprise must register with and receive a business license from the State Administration for Industry and Commerce (the SAIC), a governmental agency with offices at the central, provincial, city and county levels throughout China.¹⁵ Registration with the SAIC not only authorizes an enterprise to do business, but may also give it the status of a legal person and a limited liability enterprise. The primary source of law in this area are the Regulations and Rules on Industrial and Commercial Enterprise Registration [hereinafter referred to as the National SAIC Regulations], promulgated by the State Council on August 8, 1982, and the Provisional Rules on the Registration and Regulation of Companies [hereinafter referred to as the National SAIC Provisional Rules] promulgated by the State Council on August 25, 1985. The National SAIC Regulations govern the registration of all domestically-owned enterprises in China, whether state-owned or not.¹⁶ The National SAIC Provisional Rules regulate Chinese enterprises which call themselves "companies."¹⁷ There are also special sets of laws regulating the formation of companies in specific industries, such as tourism and insurance,¹⁸ but these will not be discussed in this article. In Shanghai, the national laws and regulations have been supplemented by the Regulations of the Municipality of Shanghai on the Registration and Regulation of Industrial and Commercial Enterprises [hereinafter referred to as the Shanghai SAIC Regulations],¹⁹ which pro-

10, 1985, at 1, col 1. The State Administration of Industry and Commerce also issued a document on the prohibition of such enterprises recently. See *National SAIC Demands Vigorously Clearing-Up Enterprises Sponsored by Party and Government Organs*, Jingji Ribao [Economic Daily], Feb. 6, 1985, at 1, last col. See also *Beijing will Clear up New Companies and Centers of Various Kinds*, Jingji Gaige Wenzhai [Digest of Economic Reforms], No. 4, 1985, at 5, which states,

Those enterprises which are owned and operated by the party and government or their official organs shall be separated from the organs; the enterprises shall sever their connections with the organs in terms of ownership and be operated independently and be responsible for their own economic results, whether profits or losses; those incumbent party and government officials who at the same time take up posts in the new companies shall resign from either their company posts or their public ones.

15. For a general discussion of the function of the SAIC, see Lutz, *The General Administration for the Control of Industry and Commerce*, THE CHINA BUS. REV. (Mar.-Apr. 1983), at 25.

16. National SAIC Regulations, sec. 1.

17. National SAIC Provisional Rules, sec. 2.

18. The Provisional Rules for the Regulation of Travel Agencies, published in Zhongguo Fazhibao [Chinese Legal System Newspaper], May 27, 1985, at 2, col. 2; and the Provisional Rules for the Regulation of Insurance Enterprises, published in Zhongguo Fazhibao [Chinese Legal System Newspaper], Mar. 29, 1985, at 2, col. 1.

19. These regulations were approved by the People's Government of the Municipality of Shanghai, and made public by the Shanghai SAIC on July 17, 1985. Since these regulations are quite new, the practices described in this article do not necessarily take them into account.

vide extensive additional detail as to the procedures and policies of the Shanghai branch of the SAIC when registering enterprises. Finally, it should also be mentioned that the Chinese government is in the process of drafting a Companies Law [hereinafter referred to as the Companies Law],²⁰ which may supersede or supplement portions of the above-mentioned laws.

B. THE REGISTRATION PROCESS

In order for a new collective enterprise in Shanghai to obtain SAIC approval for its registration, it must meet the following requirements, the adequacy of which the SAIC is empowered to pass upon.

(1) *Approval of Superior Organization.* The tradition in centrally planned China is for all factories and companies to report in hierarchical fashion to a "superior organization [zhuguan bumen]," which may be a parent company or a governmental agency.²¹ This continues with the new collective enterprises, which must "report" to a superior organization, although the ties are often much more tenuous than in the case of traditional Chinese enterprises. This superior organization must approve the establishment of the new collective enterprise.²²

It is not always obvious which is the appropriate superior organization. The new enterprise may propose to engage in a business which falls within the overlapping jurisdictions of more than one governmental agency. In such cases one of the agencies may be chosen as the superior organization,²³ but more than one governmental approval may be required.²⁴ For example, industrial enterprises may have to obtain the approval of not only the governmental agency in charge of their industry, but also government agencies responsible for pollution control, real property and housing man-

20. See *Our Country Speeds up Economic Legislation*, Shijie Jinji Daobao [World Economic Herald], No. 245, July 8, 1985, at 7, col. 1.

This law is still in its preliminary stages and is not publicly available. Indications are that it probably will be passed sometime in the next two years; however, it is unlikely to be available in the immediate future. The authors believe that the general principles of this law will not be inconsistent with the existing rules and practices described herein, except as otherwise noted.

21. However, note that section 9 of the National SAIC Regulations uses the term "superior organization" only with reference to a parent company.

22. Section 9 of the National SAIC Regulations seems to imply that both a parent company superior organization and a governmental agency must give their approvals. However, section 9(2) of the National SAIC Provisional Rules and section 5(2) of the Shanghai SAIC Regulations state that only one such approval is sufficient, and that if no superior organization exists the local SAIC office may give the approval.

One must not assume that the immediate superior organization has final authority over the matter, for it is possible for a superior organization to be overruled by its own superior organization.

23. Often this is the subject of some negotiation between possible governmental agency superior organizations and the new enterprise, with the governmental agency sometimes requiring a "management fee" of approximately five percent of the profits of the new enterprise.

24. See Shanghai SAIC Regulations, sec. 28.

agement, and so on. However, the Shanghai SAIC Regulations give some guidance on this matter by grouping enterprises by lines of business and implying that each category of enterprise has its own set of registration methods, including presumably the identity of the appropriate superior organization to give approval.²⁵

The primary standard typically used by the superior organization in deciding whether or not to approve the establishment of a new collective enterprise is the local need for such a new enterprise.²⁶ This is of course a very general standard which leaves much to the discretion of the deciding officials. In addition, the superior organization considers the sufficiency of the capital of the new company. The superior organization also usually requires the promoters to file a feasibility study for the new company, as well as any agreement among promoters with respect to their contributions of capital and sharing in profits.²⁷

The level of the approving superior organization determines what level office of the SAIC the registration application should be made. For example, if the approving superior organization is a provincial organization, registration should be effected at the provincial SAIC office. The level of registration has an impact on the prestige of the enterprise, since it affects the enterprise's choice of name, discussed below.

(2) *Registered Capital.* The SAIC examines the enterprise for the sufficiency of its "registered capital [zhuce zijin]." If the enterprise wishes to be called a "company [gongsi]" or a "center [zhongxin]" it must have a specified "working capital [liudong zijin]"²⁸ of from 10,000 to 200,000 RMB, depending on its line of business.²⁹ Money borrowed from banks cannot be counted as capital.³⁰ The reason for these fairly high capitalization requirements is that the words "company" and "center" have typically referred to large state-owned parent companies or similar entities, and the SAIC apparently feels it would be misleading to the public for a smaller enterprise to use these names.

(3) *Articles of Association.* A new collective enterprise is required to file its Articles of Association with the SAIC.³¹ These Articles are required to contain provisions regarding the name and address of the enterprise, its

25. See Shanghai SAIC Regulations, sec. 2.

26. Based upon our understanding of the practice of various governmental agencies.

27. *Id.*

28. See note 60 *infra* for an explanation of this term.

29. National SAIC Provisional Rules, sec. 7 and Shanghai SAIC Regulations, secs. 8 and 17. In the case of companies wishing to make a public offering of stock, the Shanghai Branch of the People's Bank of China, Finance Administration Division, which regulates public stock offerings, has an unwritten policy of requiring 30 percent of the registered capital to be contributed by the organizers before the public offering is made.

30. National SAIC Provisional Rules, sec. 5(3).

31. National SAIC Regulations, sec. 9. Shanghai SAIC Regulations, secs. 5(3) and National SAIC Provisional Rules, section 9(3), only require "companies" to provide Articles of Association, so it is unclear whether smaller collective enterprises are required to have Articles.

purpose, the nature of its ownership, the sources and amounts of its funds, whether it has limited liability, the scope and manner of doing business, its organizational structure and form of management, the name of its legal representative, the manner of sharing profits and losses, and the names and addresses of shareholders.³² Thus, the Articles appear to be a combination of what would normally be found in the articles and bylaws of a U.S. corporation, along with some provisions that would be found in a corporations code. Interestingly, the practice in this area at present has been significantly influenced by the Law on Chinese-Foreign Equity Joint Ventures. In the future the new Companies Law will likely also have specific requirements as to the form of such Articles and will generally be the controlling law on this point.

(4) *Lines of Business.* The new enterprise must choose one or more primary lines of business, and may also choose several secondary lines of business.³³ It must also state its proposed "manner of doing business [jing-ying fangshi]," such as retailing, wholesaling, manufacturing, or foreign trade.³⁴ The enterprise is expected to emphasize its primary lines of business, but may rely on its secondary lines of business for short-term or supplementary profits. Often the secondary lines of business are related to its primary lines. The primary and secondary lines of business and the manner of doing business are printed on the business license of the enterprise once it is registered with the SAIC. Wholesaling of important raw materials, goods incorporated in the State Economic Plan, durable goods in short supply, and whole imported goods are reserved for state-owned enterprises, certain old collective enterprises and foreign trade companies, and cannot be engaged in by the new collective enterprises.³⁵

(5) *Employees.* The enterprise is required to have a full-time employee and accounting officer.³⁶ If the enterprise is engaged in science or technology related fields or in manufacturing, then the chief executive officer must previously have held the rank of at least an engineer, doctor, university lecturer or the equivalent.³⁷ This executive need not be the highest ranking officer of the company; there may be other higher ranking officers who only work part-time or merely act as figureheads. The enterprise must state the total number of its employees.³⁸

32. National SAIC Provisional Rules, sec. 6 and Shanghai SAIC Regulations, sec. 6.

33. National SAIC Regulations, sec. 5.; Shanghai SAIC Regulations, secs. 6(b) and 20.

34. National SAIC Regulations, sec. 5; Shanghai SAIC Regulations, sec. 6(b).

35. Shanghai SAIC Regulations, sec. 22.

36. Shanghai SAIC Regulations, sec. 7(3). Whether this is plural or singular for each of these requirements is unclear. The full-time employee will probably be required to be the chief executive officer of the enterprise.

37. Based upon our conversations with officials of the Shanghai SAIC and enterprise officials during June and July of 1985.

38. National SAIC Regulations, sec. 5.

(6) *Name of the Enterprise.* The choice of a name for an enterprise is governed by the Interim Regulations on the Registration of Names of Industrial and Commercial Enterprises [hereinafter referred to as the SAIC Name Regulations]³⁹ and by provisions of the Shanghai SAIC Regulations. These regulations generally recognize the enterprise's proprietary rights in its name once the name is registered with the SAIC.⁴⁰ Once a name is registered with an SAIC office no other enterprise may use that name or a confusingly similar name within the jurisdiction of such SAIC office.⁴¹ In addition, any enterprise which is registered with a city or county level SAIC office may apply to its provincial SAIC office for exclusive rights to use such name within its line of business in such province.⁴² The name of the enterprise must reflect the location and level of the SAIC office with which it is registered. For example, only enterprises registered with the national SAIC office in Beijing may use the word "China" or other similar word denoting nationwide scope in their name;⁴³ enterprises registered with city SAIC offices must use the name of that city in their name.⁴⁴ The Shanghai SAIC Regulations also seem to require that the name of the enterprise reflect its particular line of business.⁴⁵

(7) *Legal Address.* The enterprise is required to submit the address of its place of business.⁴⁶ In Shanghai, if the enterprise is called a "company" and it rents its working space, it must submit to the SAIC a copy of a lease agreement of at least one year's duration.⁴⁷ All of this is to ensure that the enterprise is stable enough to have a fixed place of business.

(8) *Date of Commencement of Business.* The enterprise must state the date it plans to commence doing business.⁴⁸

(9) *Nature of Ownership.* The enterprise must state the nature of its ownership,⁴⁹ which in the case of a collective enterprise would be described as "collective."⁵⁰

39. These national regulations were passed by the State Council on May 23, 1985 and published in *Zhongguo Fazhibao* [Chinese Legal System Newspaper] June 17, 1985, at 2, col. 1.

40. SAIC Name Regulations, secs. 2, 6, 7; Shanghai SAIC Regulations, sec. 18, para. 4. Note that China has also recently enacted a Trademark Law. See generally Chang and Conroy, *Trade-mark Laws in the People's Republic of China*, FOREIGN TRADE, INVESTMENT AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA, at 269-280 (M. Moser ed. 1984).

41. SAIC Name Regulations, sec. 6; Shanghai SAIC Regulations, sec. 18, para. 4.

42. SAIC Name Regulations, sec. 6, para. 2. See also Shanghai SAIC Regulations, sec. 18, para. 3.

43. SAIC Name Regulations, sec. 6 paras. 3 and 4; Shanghai SAIC Regulations, sec. 18, para. 2.

44. SAIC Name Regulations, sec. 6, para. 1.

45. Shanghai SAIC Regulations, sec. 18, para. 1.

46. National SAIC Regulations, sec. 5; Shanghai SAIC Regulations, sec. 7(1).

47. Shanghai SAIC Regulations, sec. 7(1).

48. National SAIC Regulations, sec. 5.

49. National SAIC Regulations, sec. 5; and Shanghai SAIC Regulations, sec. 6(3).

50. There is currently a debate in China over the nature of ownership of those new

The SAIC is required to carefully examine the application and verify that the statements made are true.⁵¹ If all is in order it is required to register the applicant within twenty days.⁵²

An enterprise must make amendments to its filing with the SAIC if any of the above items change. With respect to changes in the name, registered capital, or lines of business, approval of the superior organization and the SAIC must be obtained before the change is effective; in all other cases the change must be reported to the SAIC at year-end.⁵³

If an enterprise operates without a business license from the SAIC, or operates beyond the scope of its business license, it may be subject to criticism and fines by the SAIC, ordered to discontinue doing business, its bank account may be frozen, and it may be required to pay over the profits from its unlawful business activity to the state.⁵⁴

Registration is required not only for doing business, but is also required before a new company may construct a site for doing business.⁵⁵ In such cases a separate set of approvals is required from the superior organization and the SAIC in order to obtain a "construction license." New approvals are required when the establishment actually opens for business.

Fees for registration with the SAIC are .1 percent of the first ten million RMB of registered capital, and .05 percent of registered capital in excess of this amount.⁵⁶

Once the SAIC approves the registration of a new collective enterprise, it is issued a business license which is essential in order for the enterprise to be able to establish a bank account and register with the local Bureau of Taxation.⁵⁷ The latter is necessary because only with the permission of the Bureau of Taxation may an enterprise obtain blank receipt forms which it must use when transacting business with other enterprises.

enterprises whose capital comes solely or partly from state-owned enterprises. The majority view appears to be that they are collective because they are established with funds belonging to a state-owned enterprise and not belonging to the state. But some argue that they are ultimately state-owned and thus should be classified as such.

51. Shanghai SAIC Regulations, sec. 29.

52. Shanghai SAIC Regulations, sec. 30.

53. National SAIC Regulations, sec. 11.

54. National SAIC Regulations, sec. 10. The SAIC does not appear to be hesitant in exercising these powers. The authors have heard of instances where the SAIC has fined or closed down enterprises which have egregiously gone beyond the scope of their business licenses, used misleading names, or committed economic crimes.

55. National SAIC Regulations, sec. 7.

56. National SAIC Provisional Rules, sec. 12.

57. See National SAIC Regulations, sec. 10, and Interim Income Tax Regulations for Collective Enterprises of the People's Republic of China, sec. 8, published in *Zhongguo Fazhibao* [Chinese Legal System Newspaper], Apr. 24, 1985, at 2, last col.

SAIC offices regulate not only the formation and registration of new enterprises, but also the registration of "economically nonindependent organizations [fei duli hesuan de fenzi jigou]" (branch offices) of Chinese enterprises previously established elsewhere in China.⁵⁸ It appears that branch offices are treated as being part of the original company and not as a new legal person. However, there does seem to be some confusion as to the level of activity in which a branch office may engage. Some local SAIC offices apparently require branch offices to register as new independent legal entities, that is, as new enterprises, once their activities go beyond merely agency and representative office functions. This is a policy that does not appear to have a basis in written regulation.⁵⁹

The threshold for when an enterprise must register a branch office seems to be when it has a permanent place of business in the jurisdiction of the SAIC office in question. If the enterprise's operation has a public sign with its name on it, this is usually sufficient to require registration. The rules with respect to what level in the hierarchy of SAIC offices the registration must be made for a branch office appear to be unsettled. Registration procedures for a branch office are similar to those for a new company (except that there is no registered capital issue), but in practice registration of branch offices is much easier to effectuate than for new companies. For this reason some promoters have taken to forming their companies in jurisdictions known to be more lenient in their registration practices and then establishing branch offices in the more difficult jurisdictions.

From the foregoing summary it can be seen that establishing an enterprise in China is far from a formality. It requires discretionary approvals from at least two governmental agencies, sometimes on the basis of standards which are not yet set forth by statute or regulation. At times additional approvals relating to the future activities of the enterprise are required prior to the establishment of the enterprise. Precise practices and the interpretation of the law vary from region to region. These questions are under consideration by the Chinese government and, it is hoped, will be addressed in the new Companies Law.

III. Capitalization

The Chinese government traditionally appropriated all fixed and working capital⁶⁰ necessary for state-owned enterprises. The new collective enter-

58. See National SAIC Regulations, sec. 4.

59. Based on interviews with SAIC officers.

60. In Chinese accounting practice, the concept of fixed capital generally refers to the funds used to purchase fixed assets. Fixed assets must have a useful life of more than one year and an original value which will only be transformed partially into products within one year, for

prises of course do not receive their capital from the state, but receive contributions in the amount of their registered capital from their shareholders. However, the concept of registered capital has its origins in the capitalization practices of state enterprises, and must theoretically be sufficient to meet the initial fixed and working capital needs of the enterprise.

The amount of an enterprise's registered capital is viewed as a measure of its financial strength, and Chinese banks often use it as a yardstick for loan decisions. Of course, after a few years of operation if the enterprise has built up retained profits or has suffered losses, its registered capital is no longer a meaningful measure of its financial condition, but this fact does not appear to be widely understood in China.⁶¹

While there is no general statutory explanation yet of the relationship between the registered capital of an enterprise and its status as a limited liability enterprise,⁶² it is generally understood by lawyers, accountants and government officials in charge of this area that the registered capital of a company is the maximum liability of the company's shareholders and that an enterprise is liable for all its debts to the extent of its assets.⁶³ However, there still exists a popular misconception that the registered capital constitutes a limit on the amount of liabilities of the enterprise itself.

The registered capital of an enterprise must usually be contributed in cash, or if specially approved, in the form of other property. In principle this registered capital must be contributed at the time of or prior to registration; however, in practice some shareholders contribute their capital soon after issuance of a business license. There is still no concept of "authorized capital" in China, although it is likely that the concept will be embodied in the new Companies Law. Thus, new approvals must be obtained upon each increase of registered capital. For example, when the Yan-zhong Business Company, Ltd., a large publicly-held collective company in Shanghai, was

example, factory and business buildings, machinery and equipment, means of transportation, and so on. Working capital generally refers to those funds used to buy current assets, that is, assets which will be used up within one year, and whose price can be totally transformed into products within that period, for example, raw materials, fuels, inventory, cash, accounts receivable and the like.

61. This situation is reflective of the fact that domestic bank lending in China to enterprises is still in its beginning stages. Most capital needs of enterprises are still appropriated by the government (in the case of state-owned enterprises) and contributed by shareholders (in the case of the new collective enterprises), not lent by banks. As domestic lending becomes more common, however, the sophistication of the financial analysis will undoubtedly improve.

62. In the case of publicly-held stock companies, Article 6 of Shanghai's Interim Regulating Methods on Public Offerings of Stock provides that where the enterprise declares bankruptcy, the shareholders as a whole shall have limited economic liability, and the debts of the enterprise shall be paid out of its assets.

Unlimited liability general partnerships do not appear to exist in China at present except in the case of very small enterprises such as shops and restaurants.

63. See *Investigation of 100 Companies in Shanghai*, *supra* note 2, at 15.

first established, it had 300,000 RMB of registered capital which was contributed by an institutional investor. When it made a public offering of an additional 4,700,000 RMB of shares, it had to apply to amend its registered capital to 5,000,000 RMB even though the plan had previously been approved by appropriate authorities.

The actual financing practices of some new collective enterprises deviate from the standards described above. Because many Chinese managers do not yet fully understand these rules, they often do not distinguish between an enterprise's registered capital and its debt. Hence, there are cases where an enterprise borrows money to use as its registered capital. It is likely that under Chinese law such "debt" would be treated as "equity" for purposes of third party creditors of the enterprise. The common practice of promoters borrowing money to invest in a new enterprise is, of course, acceptable.

Investment transactions in new collective enterprises can be divided into three distinct types, based upon the scope of the offering.

(1) *Limited Offerings without Stock Certificates.* In this type of transaction a small number of investors, including primarily the promoters, contribute capital to the enterprise. The contributions may be in the form of cash, labor, the right to use a building, land or technology, or other property. No stock certificates are issued but the enterprise is still a limited liability enterprise. The shareholders will usually enter into a Shareholders Agreement setting forth their capital contributions, share of profits and management responsibilities. This is the most common type of new collective enterprise and the procedures for formation are as described in the preceding section.

(2) *Unrestricted Public Offerings.* The most revolutionary form of investment transaction in China in recent years has been the unrestricted public offering (as distinguished from public offerings to a restricted group of investors, described later), examples of which have been occurring throughout the country. Enthusiasm for these offerings is running high, with stories of investors coming from distant provinces and lining up overnight for an opportunity to purchase shares being common. In Shanghai as of the end of March 1985, twelve companies had obtained approval to make a public offering of stock, and ten such offerings had been consummated.⁶⁴

Public stock offerings may hold the key to vitalizing the domestic capital flows of China. The amount of public savings in China is tremendous,⁶⁵ and these funds have at present no investment outlets other than bank deposits

64. Based upon conversations with bank officials in Shanghai in March 1985.

65. At the end of 1984, the balance of individual bank deposits in China amounted to 121.5 billion RMB, while in that year the state-owned enterprises retained 31.3 billion RMB as profits after taxes which they were permitted to invest at their discretion, ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO [Chinese State Council Communiqué], No. 11, at 311 and 323 (1985).

and government bonds, both of which earn relatively low rates of interest.⁶⁶ Meanwhile, the development needs, and hence capital needs, of China are vast. Stock offerings may be a means of satisfying the needs of both savers and users of capital.

It is unclear whether Chinese law permits foreigners to purchase publicly offered shares of stock in Chinese collective enterprises. It could be argued that any foreign investment is subject to the Chinese regulatory structure relating to foreign investment, such as the Law on Chinese-Foreign Equity Joint Ventures, thus requiring prior governmental approval. However, academic circles in China are discussing the possibility of portfolio foreign investment in China as an additional channel for attracting foreign capital to China.

Public offerings of stock are regulated by the Finance Administration Division of the People's Bank of China [hereinafter referred to as the FAD]. The Shanghai FAD has promulgated its own Interim Regulating Methods on Public Offerings of Stock [hereinafter referred to as the Public Offering Regulations] which contain various rules and procedures for the issuance of stock in Shanghai.⁶⁷ Based upon these regulations and the author's examination of the practices used in connection with recent transactions, some general statements can be made about public stock offerings in Shanghai.

The Public Offering Regulations provide that only newly-established collective enterprises may make public offerings of stock.⁶⁸ The shares may be of two types, those for institutional investors and those for individual investors.⁶⁹ Returns on stock investment are divided into two portions, interest and dividends.⁷⁰ The interest rate, calculated based upon the par value of the stock, is equal to the rate which the investor, institutional or individual, would respectively receive on one-year deposits with a bank in China.⁷¹ As a matter of practice the par value is always equal to the issuance

66. For one-year individual bank deposits, the annual interest rate is 6.84 percent, while for one-year institutional bank deposits, the annual rate is 4.32 percent. See the Report of the People's Bank of China on the Adjustment of Interest Rates, Deposits and Loans, ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO [Chinese State Council Communiqué], No. 10, at 263 and 265 (1985). Individual holders of government bonds can earn an annual interest rate of 9 percent on five-year bonds, while institutional holders earn 5 percent. Principal and accrued interest on the bonds is paid only at maturity, and no compound interest is calculated or paid. Regulations of the People's Republic of China on 1985 Treasury Notes, published in CAIZHENG [Public Finance], No. 1, at 9 (1985).

67. See also *Written Answers to Problems Regarding Public Offerings of Stock by the People's Bank of China, Shanghai Branch*, Jiefang Ribao [Liberation Daily], Jan. 8, 1985, at 2, col. 1 [hereinafter referred to as Bank Answers]. Since this article was prepared by the bank, it appears to have some official authority.

68. Public Offering Regulations, art. 1.

69. Public Offering Regulations, art. 2, and Answer 2 of the Bank Answers, *supra* note 67.

70. Public Offering Regulations, art. 3, and Answer 3 of the Bank Answers, *supra* note 67.

71. *Id.*

price of the stock. This interest portion apparently must be paid regardless of the profitability of the issuer. The dividend portion is paid at the discretion of the issuer, depending on its profitability. However, the aggregate annual rate of interest and dividends may not exceed 7.2 percent of the par value of the stock for institutional shares and 15 percent for individual shares.⁷² As a practical matter companies strive to pay the maximum allowable return because if they did not they would face a loss of credibility with their shareholders. Interestingly, as in the United States, the interest payment portion may be deducted when calculating the company's taxable income, while the dividend payment may not.⁷³ Stock may be redeemable, and if so it may be redeemed in installments or at one time.⁷⁴ If no reference is made to redemption, the stock is not redeemable.⁷⁵

The Public Offering Regulations set forth specific procedures before the FAD will approve an offering. The issuer must make the following filings, each of which may be reviewed by the FAD for its adequacy: (i) The issuer must obtain a recommendation from its local bank office supporting the offering.⁷⁶ (ii) The issuer must file "Articles for Subscription of Stock,"⁷⁷ a document much like a very abbreviated prospectus disclosing the name, incorporation date, and business of the issuer, the number and par value of the shares being offered, the use of proceeds and the redemption date if applicable. (iii) The issuer may also be required to file additional documents such as its Articles of Association, its feasibility study, business license and other similar documents.⁷⁸ Once the FAD approves the offering, all mechanical and administrative details of the offering may be carried out in conjunction and consultation with the trust department of the issuer's local bank.⁷⁹

The Articles for Subscription of Stock must be published in a local newspaper.⁸⁰ The shares are often purchased through the use of a subscription agreement and the purchase price may or may not be paid on the date of signing. Once the offering proceeds are received, the issuer must inform the FAD of the total amount of such proceeds.⁸¹

72. *Id.*

73. *Id.*

74. Public Offering Regulations, art. 5.

75. *Id.*

76. Public Offering Regulations, art. 1, and Answer 4 of the Bank Answers, *supra* note 67. This reflects the fact that banks in China not only serve as financial institutions, but also as semigovernmental regulatory organizations with growing powers of oversight with respect to enterprises.

77. Public Offering Regulations, art. 1, and Answer 4 of the Bank Answers, *supra* note 67.

78. Answer 4 of the Bank Answers, *supra* note 67.

79. Public Offering Regulations, art. 1.

80. Based upon our understanding of the practice in Shanghai.

81. *Id.*

Shareholders are issued stock certificates with their names printed on them. These certificates are registered with the issuing company, and the latter keeps a list of stockholders' names and addresses. Shares may be assigned or mortgaged, but such transactions must be handled by the trust department of the issuer's bank.⁸² Transfers must be present transactions, not executory,⁸³ and must be paid for at par value.⁸⁴

(3) *Public Offering to a Restricted Group.* In addition to the unrestricted public offerings of stock described above, stock certificate offerings to restricted groups of investors are at present an even more common form of transaction. In the typical case, a state-owned enterprise establishes a new collective enterprise which obtains its capital in whole or in part from the employees of the state-owned enterprise. One of the primary purposes of such a new enterprise is to enhance the welfare of the workers of the state-owned enterprise by providing them with dividends, services and other benefits. Often the new enterprise sells products of the state-owned enterprise, and if a stockholder should leave the employment of the state-owned enterprise his stock is required to be resold to the new enterprise at par value. Transfer of shares can only be made to other employees of the state-owned enterprise. Often there are limitations on the number of shares each employee may purchase so as to maintain a certain equality of benefits among employees. While public offerings of stock must usually be approved by the FAD, when the offering is restricted in this way it is sufficient to file a plan of issuance with the FAD.⁸⁵

From the foregoing it can be seen that stock in collective enterprises in Shanghai somewhat resemble preferred stock in the United States. There is apparently no equivalent of a bond or common stock in use by collective enterprises.⁸⁶ This reflects the fact that a clear distinction between equity and debt has not developed in China, and the public as well as many enterprise executives view stock as another form of debt. Thus, there is a great deal of emphasis placed on the par value of stock, which is viewed much like the principal amount of debt. The public generally believes the value of a stock to be by definition equal to its par value, notwithstanding the financial condition of the issuer or the higher rate of return offered by stock.

80. Based upon our understanding of the practice in Shanghai.

81. *Id.*

82. Public Offering Regulations, art. 4, and Answer 5 of the Bank Answers, *supra* note 67.

83. Public Offering Regulations, art. 4.

84. Public Offering Regulations, art. 4, provides that the trust department of the People's Bank of China shall work out a method to calculate the transfer price of stock. Apparently no written rules exist, but the practice is to transfer at par value.

85. Answer 7 of the Bank Answers, *supra*, note 67.

86. State-owned enterprises are permitted to issue bonds. Public Offering Regulations, art. 7.

It obviously follows that investors purchase stock not in the hope of appreciation in value, but for the annual returns they generate. Because of this, new collective enterprises tend to be engaged in businesses which yield short-term rather than long-term, profits. From an economic point of view this may not be the ideal situation, but it probably will not change until investor psychology changes and a secondary securities market is established.

The lack of distinction between debt and equity also results in contradictions between the policy of conserving registered capital and the requirement of paying "interest" and sometimes, "principal" on stock. If a new enterprise has made no profits and indeed has suffered losses, must it pay the interest portion of its return to stockholders, or should it conserve its registered capital? If the stock is redeemable, must it be redeemed in accordance with its redemption schedule in such cases? One solution to the problem is of course for the new Companies Law to give enterprises the flexibility to issue several types of securities, some classified as debt and others as equity.

Another area which remains to be developed is a disclosure law with respect to issuers of securities. Such a law is still in the planning stages and is unlikely to be enacted in the near future. In the meantime the public does not seem to demand significant disclosure documents in connection with public offerings.⁸⁷ This may be explained by the fact that, as mentioned above, the public still does not yet directly relate the value of a security to the condition of its issuer. Once the public becomes more sophisticated in these matters, prospectuses will undoubtedly become more complete. Note, however, that the Shanghai SAIC Regulations do contain the beginnings of a reporting statute in that section 12 requires registered companies to make annual reports, presumably on a form supplied by the SAIC, and to provide year-end balance sheets to the SAIC within thirty days after the end of each year.

IV. Management

The management structure and practices of the new collective enterprises in China have developed almost overnight and in the absence of directly applicable statutory authority or precedent. Despite the apparent lack of rules, the numerous cases we examined demonstrated a relatively high

87. In Shanghai the only document typically provided to the public in offerings of stock is a one-page document entitled "Articles for Subscription of Stock" which gives a very general description of the issuer together with the terms and conditions of the offering. Several months after the offering the issuer may provide a report to its shareholders, but this is not required by law and usually no financial statements are provided.

degree of uniformity.⁸⁸ This is explainable in part by the influence of the Law on Chinese-Foreign Equity Joint Ventures, which sets forth some rules for the management structure of joint venture companies. The new enterprises have probably also been influenced by foreign companies law.⁸⁹

In virtually all cases that we have examined, ultimate control of the enterprise rests, at least in theory, with the shareholders, who have the power to elect either directors or officers of the enterprise. With smaller nonpublicly-held enterprises this is often expressed in a Shareholders Agreement which allocates control over management among the shareholders. In the case of publicly-held companies the Articles of Association call for periodic shareholder meetings to elect a Board of Directors and vote on other important matters, such as increasing the capital of the enterprise, mergers, selling assets, liquidating the enterprise, mergers, or amending the Articles. In the case of the Yan-zhong Business Company, Ltd., because there were over 18,000 shareholders, it was considered impractical to allow all shareholders to participate in shareholder meetings, so "shareholder representatives" were selected by the management of the company to act on behalf of the shareholders. These shareholder representatives were chosen on the basis of their reputation and ability to help the company, and the number of shares they owned.

Larger companies usually have a board of directors which is responsible for appointing and removing the President of the company, making company policy on such issues as financing and the declaration of dividends, reviewing important decisions made by the president, and suggesting and reviewing amendments to the Articles of Association. In larger companies the Board is elected at shareholder meetings while with smaller enterprises the Board is often appointed by shareholders pursuant to a Shareholders Agreement. As a practical matter the board of the new collective enterprises often has more of a symbolic function than a substantive one. The board usually consists of well-known citizens who may or may not devote serious attention to the affairs of the enterprise. The real power in the enterprise usually is in the hands of the president.

There is another body common with larger collective companies that does not seem to have any analog in American corporations: the "monitoring committee." The monitoring committee appears to be an oversight organ-

88. The comments and descriptions in this section are based upon our examination of twelve new collective enterprises of varying sizes and types in the Shanghai area. They included one company which had made a public stock offering, two companies which had been formed by employees of state-owned enterprises, and one wholly-owned subsidiary of a state-owned enterprise.

89. The Delaware Corporations Code has been translated and published in China and appears to have wide circulation among Chinese lawyers.

ization which monitors the activities and decisions of both the board and the president. It may challenge decisions made by the latter two and may ask them to reconsider their decisions. However, the monitoring committee does not have the power to overturn their decisions. Members of the monitoring committee are also selected at shareholder meetings.

The president is the highest ranking officer of an enterprise and is ultimately responsible for the management of the enterprise. The president usually has responsibility for the day to day management of the enterprise, prepares the business plan of the enterprise, appoints vice-presidents and other officers with the concurrence of the board, and is responsible for similar matters.

Like American corporations, Chinese collective enterprises can only act through their representatives. However, unlike American companies, the new Chinese companies only have one originally designated legal representative to act on its behalf. This legal representative is usually either the chairman of the board or the president, and is designated in the Articles of Association or appointed by the board. This legal representative in turn authorizes lower officers to act on behalf of the enterprise through the use of powers of attorney. As a practical matter, however, officers of a company often act on behalf of the company, for example, by signing contracts, without the formality of a power of attorney.

V. Taxation

The entire system of taxation in China is undergoing change, and the taxes payable by collective enterprises are no exception. In general there are two primary categories of taxes on collective enterprises. First, there are taxes based on a percentage of the value of the turnover or output of an enterprise, or a percentage of the value-added by the enterprise.⁹⁰ The applicability and rate of these taxes varies widely depending upon the line of business of the enterprise. These taxes are in the process of replacing the prior Industrial and Commercial Consolidated Taxes and differ from the latter in that they divide lines of business into a much larger number of categories, and for the first time introduce the concept of a value-added tax with respect to certain lines of business. These taxes apply both to collective enterprises and state-owned enterprises. We will not go into detail here regarding this category of tax.

Secondly, the new Interim Income Tax Regulations for Collective Enterprises [hereinafter referred to as the Collective Enterprise Income Tax]⁹¹

90. These taxes have not been formally codified but have already been implemented with respect to some enterprises.

91. See *supra* note 57.

has replaced the old Industrial and Commercial Income tax. While both involve a graduated system of income taxation, the new law somewhat reduces tax rates and applies to a smaller range of enterprises.⁹²

The new collective Enterprise Income Tax applies to all collective enterprises, both new and old.⁹³ Under the law a new collective enterprise must register with the local office of the Bureau of Taxation within thirty days of receiving its business license from the SAIC.⁹⁴ If the enterprise stops doing business, merges with another enterprise, splits-up, changes its business lines, or moves, it must amend its registration with the bureau of taxation within thirty days of approval of these changes by the SAIC.⁹⁵

Taxes under the collective Enterprise Income Tax are at graduated rates, with a minimum rate of 10 percent, and a maximum rate of 55 percent for taxable income of over 200,000 RMB. Enterprises are required to make estimated tax payments to the bureau of taxation each month or quarter and provide a final accounting at year-end.⁹⁶ The estimated tax payments must be made within ten days of the end of the period in question and any year-end adjustment payment must be paid within thirty-five days after the end of the year.⁹⁷ If such payments are made late, then a penalty of .5 percent per day of the overdue amount must be paid.⁹⁸

A collective enterprise must prepare its tax returns in accordance with accounting and tax regulations and submit all relevant information concerning income tax to the Bureau of Taxation, including accounting books, business investments and invoices.⁹⁹ Violations of the procedural provisions of the law subject the enterprise to a discretionary penalty of up to 5,000 RMB.

If any enterprise under-reports its taxes, in addition to paying the shortfall, it is subject to a discretionary penalty of up to the amount of taxes underpaid.¹⁰⁰ In egregious cases, officers of the enterprise are subject to criminal penalties.¹⁰¹

92. The old tax applied to some state-owned enterprises whose economic activities were not incorporated into the State Economic Plan, while the new tax only applies to collective enterprises.

93. Section 1 of the Collective Enterprise Income Tax. However, in practice there appears to be an exception to this rule for domestic joint venture companies between two or more Chinese companies. In such cases the joint venture company itself is not taxed, but the participating companies in the joint venture are subject to income tax on their proportionate shares of the joint venture's income.

94. *Id.*, at sec. 8.

95. *Id.*, at sec. 9.

96. *Id.*, at sec. 6.

97. *Id.*, at sec. 10.

98. *Id.*, at sec. 14.

99. *Id.*, at sec. 12.

100. *Id.*, at sec. 15.

101. *Id.*

In case of disagreements between an enterprise and the Bureau of Taxation, the enterprise must still pay the amount of taxes determined owing by the Bureau of Taxation but may make an appeal to a higher level of authority in the Bureau of Taxation, or eventually to the courts.¹⁰²

New enterprises are often accorded tax holidays of one year or more with respect to their income tax.¹⁰³ Application for exemption is made to the local Bureau of Taxation, and a decision is made in theory based on the desirability of the enterprise.

VI. Conclusion

The last few years have been a period of dynamic change and development for the private sector of the Chinese economy. Newer and more flexible organization structures, capitalization techniques and management forms have been adopted. Many new laws have been needed in order to provide a legal framework for these business practices, and to ensure that they conform to official government policy.

While by western standards the degree of governmental regulation may seem relatively high, it is certainly much easier to engage in private enterprise in China today than in 1978 when the recent economic reforms began. These new practices and laws make it possible for motivated associations of investors to more easily engage in cooperative economic activities and to manage them on an autonomous basis. These developments also have the potential of energizing the flow of domestic capital within China, by tapping the vast pools of Chinese individual and institutional savings. All of this is quite remarkable by any measure.

The work has just started. The business practices are still evolving quickly to higher levels of sophistication and new laws are cascading down at a dizzying pace. However, the direction of change is clear. In the future the private sector will be increasingly independent and will play a significantly more important role in the Chinese economy. Chinese laws will become increasingly complex in order to structure and regulate these new forms of business activity. The laws will also gradually provide government agencies with more and more objective standards by which to exercise their discretionary authority. The outcome will be an expanded role for the rule of law in regulating private enterprise in China.

102. *Id.*, at sec. 19.

103. Based upon our understanding of the practice in Shanghai.

